

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County

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Honorable DeAndrea G. Benjamin, Circuit Court Judge FEB 24 2020

Opinion No. 2019-UP-391 (S.C. Ct. App. Filed December 18, 2019) S.C. SUPREME COURT

THE STATE,

RESPONDENT,

V.

BRIAN EVERETT PRINGLE,

PETITIONER

APPELLATE CASE NO 2020-000335

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that pursuant to the South Carolina Court of Appeals' Opinion in this case issued on December 18, 2019, a Petition for Rehearing was filed on January 2, 2020, which was denied by the South Carolina Court of Appeals on January 23, 2020.

QUESTIONS PRESENTED

1.

The Court of Appeals erred in upholding the trial judge's decision to allow the jury to hear two officers' prior bad acts testimony on the ground that such evidence established identity because the state presented identity evidence in the form of DNA statistics and four witnesses, which meant that the officers' testimony served only to establish improper prejudicial propensity and character evidence that ultimately denied petitioner of the right to a fair trial in the case.

2.

The Court of Appeals erred in upholding the trial judge's decision to allow a crack pipe found at the scene into evidence at trial because the prejudicial value of this evidence far outweighed any probative value.

STATEMENT OF THE CASE

Petitioner Brian Everett Pringle was convicted of three counts of strong arm robbery during the July 2017 term of the Richland County General Sessions Court before Judge Deadra G. Benjamin. Petitioner was sentenced to imprisonment for an aggregate period of fourteen years. Petitioner was represented at trial by W. Michael Duncan, and Assistant Solicitors Richard C.R. Cathcart and Jeremiah Joseph Shellenberg appeared on behalf of the state.

Petitioner appealed his convictions and sentences. On December 18, 2019, the South Carolina Court of Appeals affirmed petitioner's convictions and sentences. See State v. Pringle, Unpublished Opinion No. 2019-UP-391 (filed December 18, 2019). App. 1-3. On January 2, 2020, petitioner filed a Petition for Rehearing in the case. App. 4-13. On January 23, 2020, the South Carolina Court of Appeals denied the Petition for Rehearing. App. 14. This petition requesting a review of the Court of Appeals' decision follows.

QUESTION I

The Court of Appeals erred in upholding the trial judge's decision to allow the jury to hear two officers' prior bad acts testimony on the ground that such evidence established identity because the state presented identity evidence in the form of DNA statistics and four witnesses, which meant that officers' testimony served only to establish improper prejudicial propensity and character evidence that ultimately denied petitioner of the right to a fair trial in the case.

Petitioner was on trial for allegedly committing the following three strong arm robberies during December 17-18, 2015: 1.) one at Pop's Gas Station on Percival Road in Columbia, SC on December 17, 2015; 2.) another at S-Mart on Greystone Boulevard in Columbia, SC on December 18, 2015; and 3.) another at Pops Gas Station on Farrow Road in Columbia, SC on December 18, 2015. At trial, the state presented the testimony of the three cashiers who were present at the three gas stations where the robberies occurred and also the testimony of the three different police officers assigned to investigate the cases. R. 79, l. 19 – R. 82, l. 20. Note, that petitioner did not testify at trial, but his girlfriend, Mary Seaburn, presented alibi testimony declaring that petitioner was with her during December 17-18, 2015. R. 277, l. 14 – R. 281, l. 20.

The state presented identification testimony from four witnesses in the case (Craft, Sumter, Isenhoward, and Carwell). Also, DNA matches were made based on swabs taken from petitioner's cap/hat and other crime scene items and extractions taken from petitioner, and confirmed by John Barron, who testified at trial regarding his findings, which included the presence of petitioner's DNA on the hat, and DNA mixtures on the swabs taken from the register counter top and door handle at the Greystone Blvd Station and from the door handle and cash register at the Percival Road Station. R. 240, l. 2 – R. 249, l. 7.

Therefore, there was no need for a witness from SCDPPP (Agent Pamela Larson) to testify at trial about her contact with petitioner and how she confirmed who petitioner was when police presented her with a picture of the suspect, who was petitioner, because the probative value of corroborating the identification evidence, which had been presented prior to her testimony, was outweighed by the prejudicial value of portraying petitioner as a criminal who obviously committed prior criminal acts that ultimately landed him under the supervision of SCDPPP Officer Pamela Lawson. The defense objected to Lawson's testimony pretrial and at trial on the ground that this testimony by Lawson was highly prejudicial and violated Rule 403, SCRE, based on the fact that she was petitioner's probation officer. R. 37, lines 14-24; R. 43, l. 8 – R. 45, l. 8; R. 45, l. 15 – R. 49, l. 11; R. 177, l. 8 – R. 185, l. 10. See In-Camera hearing of Ms. Lawson at R. 174, l. 2 – R. 177, l. 16. The trial judge allowed Lawson to testify at trial on the ground that this covered the identity issue. R. 215, l. 21 – R. 219, l. 6. At trial, Lawson testified that she was employed by SCDPPP in 2015, and had face to face contact with petitioner then, and that when police asked her to identify petitioner in a series of photographs she was able to identify petitioner from the pictures. R. 215, l. 21 – R. 217, l. 22.

Also, Police Officer John Carwell testified that he viewed the still pictures from the City of Columbia video and recognized the perpetrator as petitioner. R. 208, l. 13 – p. 209, l. 25.

On appeal, petitioner argued that the lower court erred in allowing the jury to hear prior bad acts evidence at trial, which included testimony from a probation and parole officer and testimony from a police officer who found a crack pipe while searching the vehicle petitioner allegedly drove on the dates the alleged robberies were committed, because the testimony was more prejudicial than probative in the case.

Regarding the prior bad acts issue, the Court of Appeals held as follows:

We find the trial court did not abuse its discretion in allowing the probation officer's identification testimony because it was offered as to the material fact, Pringle's identity, and was not needlessly cumulative. See *State v. Baccus*, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006) ("In criminal cases, the appellate court sits to review errors of law only."); *State v. Gaster*, 349 S.C. 545, 557, 564 S.E.2d 87, 93 (2002) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) ("An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support."); *State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998) ("All evidence is meant to be prejudicial; it is only *unfair* prejudice which must be avoided." (quoting *United States v. Rodriguez-Estrada*, 877 F.2d 153, 156 (1st Cir. 1989)) (emphasis in original)); *id.* ("Unfair prejudice does not mean the damage to a defendant's case that results from the legitimate probative force of the evidence; rather it refers to evidence which tends to suggest decision on an improper basis." (quoting *United States v. Bonds*, 12 F.3d 540, 567 (6th Cir. 1993))); *State v. Lyle*, 125 S.C. 406, 436, 118 S.E. 803, 814 (1923) (holding "a trial court has no discretionary power to exclude competent evidence that is not merely cumulative, offered as to a material point of fact, the proof of which is essential to the establishment of a party's cause of action"); *id.* at 439-40, 118 S.E. at 815 ("Every fact [...] which closes up an exit of possible distrust of the testimony, i.e., which prevents or refutes a possible discrediting hypothesis, is a corroborative fact." (quoting John Henry Wigmore, *Principles of Judicial Proof* 732 (1913))).

At trial, Kimberly Strother testified that she was working overnight as a cashier at the Pops Gas Station on Percival Road in Columbia, South Carolina, during the early morning hours of December 18, 2015, when a customer walked in asking for change for a dollar bill in order to use the air pump. Strother stated that she saw a small blue truck (Suzuki style) beside the air pump and proceeded to open the register drawer to make change. When she opened the till, the customer reached into the drawer, took the money out and then ran out of the store. Strother stated that the customer had a beard and wore a camouflage hat at that time. Strother was not able to identify the customer from a photographic layout. R. 142, l.14 – R. 151, l. 4. Police Officer Kevin Scott Isenhoward testified that he was assigned to investigate the Percival Road robbery, and that when he learned of the details of that robbery, he developed petitioner as a suspect based on his experience, and that when he saw the store video, then it was confirmed that

petitioner was a suspect. R. 186, l. 21 – R. 189, l. 25.¹ Kimbrell Sumter testified that she was working 3rd shift as a cashier at the S-Mart Gas Station on Greystone Boulevard in Columbia, South Carolina, when a customer walked in and picked out a honeybun to purchase and then placed a one dollar bill on the counter. Sumter stated that when she opened the register, [the customer] jumped across the counter and got all of the money out of the register “and then fled to a Geo Tracker” vehicle. Sumter could not identify the perpetrator at the first photograph layout she was shown, but later identified petitioner’s picture as the perpetrator shown to her (only 50% sure) at the second police photographic lay-out shown to her. R. 115, l. 23 – R. 127, l. 2. City of Columbia Police Officer Allison Fitzgerald stated that she was assigned to investigate the S-Mart robbery and that based on Isenhoward’s advice after his viewing of the still pictures from that store robbery video, she developed petitioner as a suspect in the case. Officer Fitzgerald stated that her research uncovered petitioner’s ownership of a blue Suzuki Sidekick (that looks like a Geo Tracker) and that she was able to get cashier Sumter on duty at the time to identify petitioner as the perpetrator after she (cashier) was shown a second photograph layout. R. 193, l. 7 – R. 201, l. 13. Torah Craft stated that she was working as a cashier at Pop’s Gas Station on Farrow Road in Richland County on the night of December 17, 2015, when a customer entered before midnight and attempted to purchase a Little Debbie Honey Bun with a one-dollar bill. Craft stated that when she opened the register, the defendant reached his hand in the register, grabbed the money out, and then fled. Subsequently, Croft identified petitioner as the perpetrator after she viewed photographic lay-out shown to her by police. R. 86, l. 13 – R. 99, l.

¹ Prior to trial, the defense objected under Rule 403, SCRE, to any testimony from Officer Isenhoward regarding the basis upon which he developed petitioner as a suspect, i.e., the fact that he knew petitioner from petitioner’s till tapping priors when he (petitioner) committed similar robberies in 2013 and the clothing that petitioner wore as part of the modus operandi in the prior robberies. The trial court excluded such testimony as inadmissible evidence. R. 31, l. 11 – R. 51, l. 7; R. 53, l. 1 – R. 74, l. 7; R. 161, l. 12- R. 173, l. 5.

11. Police Officer Cris Truluck investigated this robbery and stated at trial that after speaking with Officer Isenhoward about the robbery (and the S-Mart robbery), petitioner was developed as a suspect in the Pop's Gas Station Farrow Road robbery as well. R. 220, l. 13 – R. 234, l. 5.

Generally, prior crimes or bad acts cannot be presented to show that the defendant had the propensity to commit the crime charged, i.e., that he is a bad person. State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990). State v. Smith, 309 S.C. 409, 419 S.E.2d 816 (1992); State v. Martucci, 380 S.C. 232, 669 S.E.2d 598 (2008). Also, even if prior crimes are considered under the Lyle² exceptions; nonetheless, the value of the priors must outweigh the prejudicial value. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). Prior crime evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Spears, 403 S.C. 247, 742 S.E.2d 878 (2013). Unfair prejudice results when there is an undue tendency to make a decision on improper basis, and also prejudice comes into play when jury's verdict influenced by the challenged evidence. State v. Martucci, supra. To be admissible, the bad act must logically relate to the crime with which the defendant has been charged, and even if admissible as relevant under Rule 401, SCRE³, and under the Lyle exceptions stated under Rule 404(b), SCRE (to show identity in this case); nonetheless, said evidence must be excluded if its probative value is outweighed by its prejudicial value under Rule 403, SCRE.⁴ See State v. King, 416 S.C. 92, 784 S.E.2d 252

² Prior crimes can only be used in order to show motive, intent, identity, absence of mistake or accident or common scheme or plan. State v. Lyle, 125 S.C. 406, 118 S.E.2d 803 (1923).

³ Relevant evidence under Rule 401, SCRE is evidence having any tendency to make the existence of any fact that it of consequence to the determination of the action more probable or less probable than it would be without the evidence.

⁴ Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion, if the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless combative evidence.

(2016). Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis. State v. Stearns, 403 S.C. 247, 742 S.E.2d 878 (Ct. App. 2013). Moreover, evidence of prior bad acts is inadmissible to suggest that the accused has the propensity to commit the crime charged. State v. Peake, 302 SC 378, 396 S.E. 2d 362 (1990). State v. Smith 309 SC 409, 419 S.E. 2d 816 (1992). Prior bad acts evidence is not admissible to show that the accused is a bad person. Mitchell v. State, 298 S.C. 186, 379 S.E.2d 123 (1989). Also, even if prior crimes are considered under the Lyle exceptions; nonetheless, the prior crimes cannot be used to show that the accused is a bad person. State v. Fletcher, 379 S.C. 17, 664 S.E.2d 480 (2008). In the case at bar, the revelation to the jury that a probation officer, who was familiar with petitioner and identified him via a photograph shown to her by police, although used to show identity, was nonetheless prejudicial and the prejudicial value outweighed the probative value because the inference was that petitioner was in the system at SCDPPP with this agent and therefore probably had a criminal record, which meant he committed other crimes, and thus held a criminal predisposition, and hence was probably guilty of the crimes for which he was being tried. The probation officer's testimony was overkill because identification evidence has already been submitted by four witnesses (coupled with DNA matches) and therefore, this needless presentation of cumulative evidence violated Rule 403, SCRE. Compare **by analogy the overkill in State v. James**, 355 S.C. 25, 583 S.E.2d 745 (2003). In State v. James, 355 S.C. 25, 583 S.E.2d 745 (2003), the Court cited to Old Chief v. United States, 519 U.S. 172 (1997),⁵ in holding that the probative value of presenting prior burglary convictions beyond the two required per the statute

⁵ In Old Chief, supra, the Court held that it was more prejudicial than probative for the prosecution to rely on the defendant's prior indictment for assault causing serious bodily injury to establish the offense of possession of a firearm by anyone with a prior felony conviction because the assault indictment prejudiced the defendant on the charge of assault with a deadly weapon which he was also on trial at that same time.

“decrease[d]” because of there was already sufficient evidence presented to prove that element. he James Court went on to hold that “although there may be rare occasions where the admission of more than two prior burglary convictions is more probative than prejudicial and therefore proper, the potential for undue prejudice—for the impermissible interpretation of such evidence as propensity or character evidence—warrants great caution.” In James, the Court reversed and held that the trial judge erred in admitting evidence of seven of James’ prior burglary convictions because the “probative value of all seven of [his] prior burglary convictions was outweighed by the very great potential for prejudice to the defendant regardless of the trial judge’s limiting instructions.” The James Court ruled that the probative value of the submission of seven prior burglaries committed to the jury was more prejudicial than probative. Rule 403, SCRE, states that “although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”

This case was not a burglary case or a drug case, but the same Rule 403, SCRE, analysis regarding whether the prejudicial value of evidence outweighed the probative value would apply here. The prejudicial value of the admission of the police and probation agent’s testimony outweighed any probative value of the same and the error in admitting the same violated petitioner’s right to a fair trial via the Fourteenth Amendment and article 1, §3 of the South Carolina State Constitution, especially since it was highly likely that the prior bad acts evidence contributed to the jury’s guilty verdicts and could not have been deemed harmless error. See State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1991), citing to Chapman v. California, 386 U.S. 18 (1967).

The Court of Appeals erred in holding that the admission of the officers’ testimony at petitioner’s trial was not error.

QUESTION II

The Court of Appeals erred in upholding the trial judge's decision to allow a crack pipe found at the scene into evidence at trial because the prejudicial value of this evidence far outweighed any probative value.

Regarding the error in admitting a crack pipe found at the scene into petitioner's case, the Court of Appeals held as follows:

To the extent the admission of the testimony of the law enforcement officer who found the crack pipe was erroneous, we find any error was harmless because, when considering this case as a whole, the evidence presented against Pringle at trial was overwhelming. See State v. Thompson, 352 S.C. 552, 562, 575 S.E.2d 77, 83, (Ct. App. 2003) (“Whether an error is harmless depends on the circumstances of the particular case.”); State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151, (1985) (“No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case.”); Thompson, 352 S.C. at 562, 575 S.E.2d at 83 (“error is harmless when it could not reasonably have affected the results of the trial.”); *id.* (“Where a review of the entire record establishes the error is harmless beyond a reasonable doubt, the conviction should not be reversed.”).

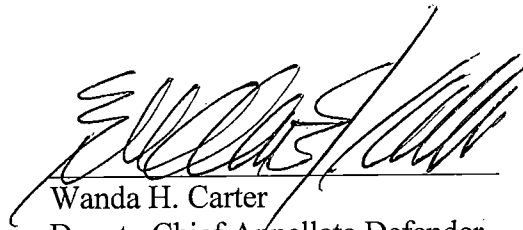
Again, the Rule 403, SCRE, analysis regarding whether the prejudicial value of evidence would outweigh the probative value would apply to the crack pipe evidence. See State v. Peake, 302 S.C. 378, 396 S.E.2d 362 (1990), where the Court reversed because the state presented testimony that the defendant, who was on trial for murder, offered to sell marijuana to the deceased days prior to her killing since the murder case had no drug connections and therefore such testimony was irrelevant and prejudicial. The Peake Court reiterated the rule that evidence of prior bad acts that are independent of and unconnected to the crime for which the accused is on trial is inadmissible at trial. The prejudicial value of the admission of the crack pipe outweighed any probative value of the same and the error in

admitting the same violated petitioner's right to a fair trial via the Fourteenth Amendment and article 1, §3 of the South Carolina State Constitution, especially since it was highly likely that this prior bad acts crack pipe evidence contributed to the jury's guilty verdicts and could not have been deemed harmless error. See State v. Charping, 313 S.C. 147, 437 S.E.2d 88 (1991), citing to Chapman v. California, 386 U.S. 18 (1967). The Court of Appeals erred in holding that the admission of the crack pipe evidence did not constitute error at trial.

CONCLUSION

Based on the foregoing arguments, counsel for petitioner requests that this Court grant the petition and allow full briefing on the above-raised questions.

Respectfully Submitted,



Wanda H. Carter
Deputy Chief Appellate Defender

ATTORNEY FOR PETITIONER

This 24th day of February, 2020.

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Richland County
Honorable DeAndrea G. Benjamin, Circuit Court Judge

Opinion No. 2019-UP-391 (S.C. Ct. App. Filed December 18, 2019)

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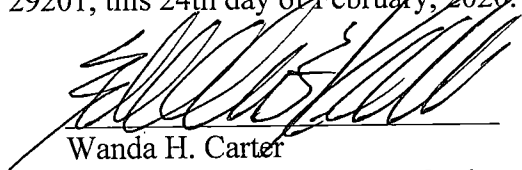
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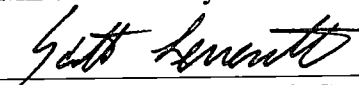
CERTIFICATE OF SERVICE

I certify that a copy of the Petition for Writ of Certiorari and a copy of the Appendix in this case has been served on Scott Matthews, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and Brian Everett Pringle, #335802, at Turbeville Correctional Institution, PO Box 252, Turbeville, SC 29162; and the Court of Appeals, at 1220 Senate Street, Columbia, SC 29201, this 24th day of February, 2020.



Wanda H. Carter
Deputy Chief Appellate Defender
ATTORNEY FOR PETITIONER

SUBSCRIBED AND SWORN TO BEFORE
ME this 24th day of February, 2020.



(L.S)
Notary Public for South Carolina
My Commission Expires: September 27, 2028.